

# New Yorkers Against the Death Penalty

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March 8, 2007

House Judiciary Committee  
Montana House of Representatives  
Helena, MT 59620

Members of the House Judiciary Committee:

I am unable to testify before the House Judiciary Committee in person on March 9, 2007 but would like to submit the testimony I gave before the Senate Judiciary Committee on this issue in February 2007.

Sincerely,

*David Kaczynski*

David Kaczynski  
Executive Director

**Testimony of David Kaczynski**  
**to the Montana State Senate Judiciary Committee**

**February 7, 2007**

I've always been opposed to the death penalty. Although I do not believe that killing a human being is inherently immoral, I do believe that taking a human life can only be justified by necessity - self-defense, a just war, or the use of lethal force by police to stop a violent criminal. If we can protect society by incarcerating murderers, including life imprisonment without the possibility of parole, then we should not use the legal system to carry out a program of unnecessary killing.

My view is consistent with faith-based positions against capital punishment adopted by most American religious denominations. The Roman Catholic Church, for one, has articulated a clear link between its moral and practical reasons for opposing the death penalty. It teaches that the death penalty is fundamentally wrong whenever non-lethal means such as long-term incarceration are available to protect society. On his last visit to the United States, Pope John Paul II pleaded for the elimination of capital punishment, calling the death penalty "cruel and unnecessary." He expressed concern not only that it inflicts damage on the condemned person but, more importantly, that it causes moral damage to society.

Up until 1995, my views on capital punishment were purely theoretical. I never imagined that one day I'd have a personal confrontation with the capital punishment system. But that fateful day came in September of 1995 when my wife Linda suggested that my estranged older brother Ted might be the notorious "Unabomber."

At first, I simply couldn't believe that Ted was capable of harming anyone. Although I believed that Ted was disturbed - he was eventually diagnosed with schizophrenia - I'd never seen any signs of violence in him. But as Linda and I pored over the Unabomber's published Manifesto, I began to confront the reality that my brother, Ted Kaczynski, might be the Unabomber.

We soon found ourselves facing a terrible dilemma where any choice we made could easily result in someone's death. If we did nothing, Ted might kill again. On the other hand, if we handed him over to the FBI, he could be executed. I had to ask myself what it would be like to go through life with my own brother's blood on my hands.

At the time, it disturbed me greatly that the price of doing the right thing might be my brother's execution. I wanted to make a life-affirming choice, but the death penalty put me in a position where any choice I made could lead to someone's death. In order to protect innocent life, I had to potentially sacrifice the life of my mentally ill brother.

I also had to grapple with the effect of the death penalty on someone else I loved: our elderly mother Wanda. I experienced first hand what the murderer and the executioner both fail to see, that the person who is killed is usually survived by family members who suffer much, much more. I feel tremendously lucky that Ted did not get the death penalty. But I can tell you with absolute certainty that if he'd been executed, he wouldn't have been the person who suffered the greatest agony; that person would have been our mother Wanda.

Our decision to turn Ted in was based on the belief that we were morally obliged to do whatever we could to stop the violence. Ten years later, we stand by our decision. It brought an end to the Unabomber's 17-year reign of terror which left three people dead and many others injured. We probably saved lives. We'd also like to believe that we set a positive example for other families facing similar dilemmas.

Over the next two years, I witnessed first hand how the criminal justice system actually works. The US Justice Department promised to protect our privacy. Instead we were swamped with media attention on the day of Ted's arrest and for months afterwards. Personal information we shared in strict confidence with the FBI ended up in the *New York Times*. Prosecutors solemnly promised to make a "fair and impartial" evaluation of my brother's mental condition. Instead they used a notorious "hired gun" legal expert to provide psychiatric testimony in my brother's case. Fortunately, my brother will spend the rest of his life in prison. But Ted's life wasn't spared because he's any sicker than one

hundred or so seriously mentally ill people that have been executed since 1992. His life was spared because he had great lawyers.

I began to see the criminal justice system as an imperfect system run by fallible human beings. From the moment of a suspect's arrest to the condemned man's final breath, the process is influenced by so many variables and so many subjective judgments that inconsistent results are practically guaranteed. The entire judicial system presumes a level playing field, but too often justice gets lost in the shuffle. As a result, we have a death penalty that disproportionately impacts the poor, people of color, and the mentally challenged.

It's probably an empty exercise to debate whether capital punishment is ever justified. Reasonable people can disagree about this philosophical question. But no reasonable person who truly understands how the current system functions can, in my opinion, claim that it represents justice. Who lives and who dies should not depend on one's wealth, one's given mental ability, one's ethnicity or race, or anyone's personal whim or bias.

Do we really want a death penalty that is applied unfairly and risks executing the innocent? A perfect system is unattainable, but a marginally better system would operate even more slowly than the current unwieldy system, cost much more and execute fewer people. It makes far more sense, in my opinion, to devote limited public resources to effective law enforcement.

Do we want more lawyers arguing in court, or more police on the street? Do we want longer trials, or better victim services? Do we want to kill an unlucky few (not necessarily the worst), or do we want to help troubled kids before they end up hurting someone? In the real world, these are the choices we must make. These are the choices you, as members of the Judiciary Committee, face as you consider bill #306.

Linda and I made *our* choice when we turned in someone we love to the FBI. In doing so, we made a difficult yet responsible, life-affirming choice. The same deeply held ethical values now prompt me to speak against the death penalty. We made sacrifices to protect people we didn't know. In doing so, we also made a statement about the kind of world we want to leave to future generations - a world where violence is truly a last resort; a world where decency and humanity come first.

Respectfully submitted by,

David Kaczynski

*David Kaczynski is Executive Director of New Yorkers Against the Death Penalty. He is the brother of convicted "Unabomber" Theodore Kaczynski. David's brother was charged capitally by the US Department of Justice after David turned him in to federal authorities, thus ending one of the longest and most expensive criminal investigations in US history.*

**Testimony of Ron Honberg, J.D., M.Ed**  
**Legal Director, National Alliance for the Mentally Ill (NAMI)**  
**Arlington, Va.**

**Hearing on the Death Penalty in New York**  
**Wednesday, December 15<sup>th</sup>, 2004**  
**New York City**

Assemblyman Lentol, Assemblywoman Weinstein, Assemblyman Aubry and distinguished members of the Committees, my name is Ron Honberg and I am the Legal Director for the National Alliance for the Mentally Ill (NAMI). I am pleased to be here today on behalf of NAMI, which is the nation's leading organization advocating in behalf of people with severe mental illnesses – disorders originating in the complex biochemistry of the brain such as schizophrenia, bipolar disorder, major depression, obsessive-compulsive disorder, and severe panic disorder. NAMI has 210,000 members who are primarily people with severe mental illnesses and their families, and more than 1,200 affiliates nationwide. NAMI's New York State affiliate, NAMI-New York State has xxx members and 49 local affiliates throughout the state.

Although NAMI's primary goals are to improve treatment and services for people with severe mental illnesses, our efforts and attention have increasingly focused on the criminal justice system in recent years. Sadly, the criminal justice system has become the de-facto "mental health treatment system" in many communities, largely because psychiatric treatment and mental health services are frequently not available to those who most need them.

Most people with severe mental illnesses in criminal justice systems have been charged with minor, non-violent misdemeanors or felonies. But, some people with these illnesses, particularly those in prisons, have been convicted of more serious, violent crimes. And, in some states, people with severe mental illnesses are significantly represented among the ranks of individuals on death row.

NAMI strongly opposes the death penalty for people with severe mental illnesses. The U.S. Supreme Court and many state legislatures have eliminated the death penalty for juveniles and people with mental retardation. We believe that it is time to extend these prohibitions to people with severe mental illnesses, for the following reasons.

- 1. The symptoms and functional effects of severe mental illnesses, like mental retardation, diminish criminal culpability sufficiently to mitigate against the ultimate punishment of death.**

The principal of retribution – one of two recognized justifications for the death penalty – requires that the penalty imposed be proportional to the defendant's culpability for the crime. In accordance with this principal, the death penalty has been reserved for only the most heinous crimes – crimes of a depraved nature committed in cold blood by individuals sufficiently in command of their faculties to be held fully culpable for their

actions. Recently, the U.S. Supreme Court, in Atkins v. Virginia,<sup>1</sup> struck down the death penalty for defendants with mental retardation, citing characteristics of these disorders that diminish the capacity of defendants to formulate criminal intent or to carry out criminal acts in cold-blooded, calculating ways.

In Atkins, the Court recognized that while mental retardation does not excuse criminal culpability, it does justify a lesser degree of culpability, thereby eliminating the death penalty as an option. Although quite different from mental retardation, severe mental illnesses similarly impact in profoundly negative ways on perception, cognition, and behavior. Thus, NAMI believes that the rationale articulated in Atkins for exempting individuals with mental retardation from the ultimate penalty of death applies equally to individuals with severe mental illnesses.

Severe mental illnesses such as schizophrenia, bipolar disorder, and major depression are biologically-based brain disorders that produce symptoms frequently beyond the control of those who experience them. For example, individuals with schizophrenia frequently experience paranoid delusions and auditory or visual hallucinations so vivid and profound that they appear real. These individuals may be unable to distinguish between delusions and reality and may sometimes act on their delusions or behave in ways that seem bizarre or incomprehensible to others. It is not uncommon for an individual experiencing paranoid delusions to perceive that he or she is under threat, when no such threat exists.

Judges and juries, faced with the monumental task of passing judgement about the culpability of individuals who commit crimes while psychotic, are essentially asked to do the impossible. It is not possible to impose logic, as the law tries to do, on biologically based brain disorders that create illogical, confused patterns of thought. Bright line tests between right and wrong do not work when it comes to evaluating the dark, unbridled confusion of psychosis, delusions, and hallucinations.

A first person account of what it is like to be psychotic can be found in the 1989 book, Private Terror/Public Life, by James Glass.

*I convinced myself several things were happening: Unrecognizable voices invaded my ears; transmitters had been planted in the ceiling; everyone on the Hall spoke about me ... spies were sent into the Hall exclusively to keep track of me and to report any suspicious behavior to the hospital administration; ... killers hid behind closed doors and waited until night to sneak into my room; food poisoned my insides and rotted out my intestines.*

The experience of psychosis cannot be fully understood by those who have not experienced it first-hand. Some who experience psychosis may be driven to act in ways that they would ordinarily never act. They may literally be powerless to control their actions because their thoughts are shaped by forces beyond their control. Under such circumstances, culpability is diminished and the death penalty is disproportionate and unjust.

The second rationale for the death penalty – deterrence – also does not apply to defendants with severe mental illnesses. It is highly unlikely that the threat of the death penalty will deter individuals who believe they are under threat or that they have been ordered by God to act in a particular way. The best way to deter such crimes is through timely and ongoing mental health treatment, something that is sadly all too often not available for people with severe mental illnesses today.

**2. There is mounting evidence that mental illness is construed as an aggravating rather than a mitigating factor in capital cases.**

Proportionality analysis, weighing aggravating factors identified in state death penalty statutes against mitigating factors in capital cases, is designed to ensure fairness in the application of the death penalty. Unfortunately, there are growing concerns that this approach is not working in cases involving defendants with severe mental illnesses.

The laws of virtually every state include mental disease or defect (the term in New York's law is "mental or emotional disturbance at the time of the offense") as a mitigating factor to consider in capital cases. Based on this, it might be assumed that cases with evidence of severe mental illness at the time of the crime will not result in death sentences. In actual fact, it appears that evidence of severe mental illness is frequently viewed as an aggravating rather than mitigating factor in capital cases.

In an article published in 2000, Professor Christopher Slobogin, a leading expert on mental illness and the law, cited a number of studies showing this trend.<sup>ii</sup> For example, a study of 175 capital cases in Pennsylvania demonstrated that all aggravating and mitigating factors listed in that state's death penalty statute correlated with the eventual sentence imposed in the predictable direction, with the exception of "extreme mental or emotional disturbance", which correlated positively with a death sentence.<sup>iii</sup> A Georgia study found a correlation between unsuccessful insanity pleas and the ultimate imposition of the death penalty.<sup>iv</sup> And, Professor Slobogin cites a number of other studies yielding similar results.

Research results suggest two possible reasons for this disturbing trend. The first concerns the perceptions of lay-people that people with mental illnesses are abnormally dangerous. Thus, jurors may view a capital defendant with schizophrenia as beyond redemption – with no amount of treatment likely to reduce that person's violent tendencies. In actual fact, the opposite is true. Psychiatric treatment has been shown to be very effective in reducing risks of violence.<sup>v</sup>

A second reason may be the cynicism of jurors that mental illnesses are real – and perceptions on the part of these jurors that raising a mental illness as a mitigating factor is a subterfuge designed to enable people to escape responsibility for their own behaviors. Research has shown that mock jurors feel far more negatively towards defendants with mental illnesses than they do towards other types of defendants.<sup>vi</sup>



The confusion of jurors about severe mental illnesses may not be alleviated by expert testimony presented in the Courtroom. In fact, it may be reinforced when competing experts for the defense and prosecution present different conclusions about the nature of the defendant's mental illness and its impact on his or her behavior.

**3. Serious concerns exist about whether procedural due process protections in capital cases are effective for defendants with severe mental illnesses.**

The ability of a capital defendant with active symptoms of severe mental illness to receive a fair trial or otherwise participate fully and knowingly in his or her own defense is in serious question. Problems can and do arise at a number of points in the process, including:

- The ability of defense attorneys to represent individuals who may not be cooperative or fully able to participate in their own defense. Although the U.S. constitution requires that defendants must be capable of participating knowingly and fully in their own defense, competency standards are quite low and may be misunderstood and unevenly applied. And, history abounds with defendants who have been allowed to proceed to trial and even represent themselves, despite serious questions about their competency to do so. One example of this is the case of Scott Panetti, a man with a long history of paranoid schizophrenia, currently on death row in Texas. Although serious questions existed about his competency to stand trial, Panetti was allowed to fire his attorneys and represent himself. At trial, Panetti wore a cowboy outfit, constantly used old western terminology, and asked irrational questions, frequently citing biblical passages and engaging in incoherent and confused streams of consciousness. Despite this, he was convicted and sentenced to death.<sup>vii</sup>
- The susceptibility of defendants with mental illnesses to coercion, e.g. false confessions, waiving their right to counsel, etc. This is a concern that was raised by the Supreme Court in Atkins, and it applies equally well to defendants with severe mental illnesses.
- The proliferation of "volunteer" cases across the country, individuals who steadfastly insist throughout the criminal process that they want to plead guilty, forego appeals, and hasten the process of execution. In my experience, the desire of these individuals to proceed with their own deaths is often symptomatic of the severity of their illnesses – this is borne out by the fact that "volunteers" frequently change their minds after they receive psychiatric treatment.

**Conclusion:**

The proposition that the death penalty in the U.S. should be applied, if at all, only to the most aberrant of criminals is beyond question. The diminished culpability of defendants with severe mental illnesses, the non-likelihood that the death penalty deters other such defendants, and serious questions about whether these defendants are fully able to access substantive and procedural due process protections in capital cases, strongly support the

elimination of this option for people who suffer from these biologically-based brain disorders. When it comes to death as a punishment, there should be no margin for error.

Thank you for giving me the opportunity to testify before you today.

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<sup>i</sup> 536 U.S. 304; 122 S. Ct. 2242 (2002)

<sup>ii</sup> Christopher Slobogin, "Mental Illness and the Death Penalty", 1 California Criminal Law Review, art. 3 (2000), [www.boalt.org/CCLR](http://www.boalt.org/CCLR)

<sup>iii</sup> David Baldus, et al, "Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia," 83 *Cornell L. Rev.* 1638, 1688-89 (1998).

<sup>iv</sup> Baldus, Id. at 640-41.

<sup>v</sup> Steadman, HJ, et al, "Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods", *Archives of General Psychiatry*, 55: 393-401, 1998.

<sup>vi</sup> Phoebe C. Ellsworth, et al, "The Death-Qualified Jury and the Defense of Insanity", 8 *Law and Human Behavior* 81 (1984)

<sup>vii</sup> See <http://www.internationaljusticeproject.org/illnessSPanetti.cfm>

## David Kaczynski

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David Kaczynski is executive director of New Yorkers Against the Death Penalty (NYADP) and the brother of Theodore Kaczynski - the so-called Unabomber - who was arrested in 1996 after David and his wife Linda approached the FBI with their suspicions that Theodore might be involved in a series of bombings that caused three deaths and numerous injuries over 17 years. Despite his diagnosis of paranoid schizophrenia, Theodore was charged capitally and only avoided the death penalty after his family waged a two-year campaign to convince the US Justice Department that Theodore's delusions had precipitated his violent behavior. Under pressure from the media and advocacy groups including the National Alliance for the Mentally Ill, the Justice Department offered a plea bargain that spared Theodore's life, but it never publicly acknowledged that Theodore's mental illness was a mitigating factor.

In 1998, David and Linda received a one million dollar reward from the Justice Department for their role in the Unabom investigation, which they subsequently dedicated \* minus attorney's fees and taxes - to the victims and their families. With help from the Community Foundation for the Capital Region, they set up the Unabom Survivors Fund, which distributed \$680,000 to victims of the assaults.

Prior to joining NYADP, David was assistant director of the Equinox shelter for runaway and homeless youth in Albany, where he counseled and advocated for troubled, neglected and abused youth in the Capital District. As director of NYADP and as a board member of the National Coalition to Abolish the Death Penalty, he is currently focused on a campaign to ban the death penalty for people with serious mental illnesses.

Through his life and his work, David has sought solutions to human problems through understanding and compassion as opposed to violence and coercion. His story touches on the things we must learn and the balances we must achieve to keep our sense of humanity alive through adversity and crisis.

David is currently writing a book on violence and healing with Gary Wright, who was seriously injured by one of Theodore Kaczynski's bombs in 1987.